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PADEN, CAROLYN A

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* LEONARDO JOSE SANCHEZ AQUINO, JADWIGA  
MALGORZATA BIALEK, and SERGEY MICHAILOVICH MELNIKOV

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Appeal 2009-011383  
Application 10/693,475  
Technology Center 1700

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Before BRADLEY R. GARRIS, BEVERLY A. FRANKLIN, and  
LINDA M. GAUDETTE, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's  
decision<sup>2</sup> finally rejecting claims 1, 3, 4, 8-17, 19-23, and 25, the only

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

claims pending in the Application.<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

The invention is directed to an edible, reduced oil emulsion containing fibers which may be used, for example, to make a reduced oil mayonnaise composition having the taste, viscosity, mouthfeel, and appearance of full oil mayonnaise. (Specification 1, Field of the Invention.) Independent claims 1 and 14 are representative of the claimed product and method, respectively, and are reproduced below from the Claims Appendix to the Appeal Brief:

1. An edible emulsion comprising:
  - a) less than about 85.0% by weight oil;
  - b) water;
  - c) about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity-building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of  $\leq 5.5$  or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both;
  - d) about 0.1 to about 1.0% by weight insoluble fibers; wherein the insoluble fibers are citrus or non-citrus; and
  - e) thickener

wherein the edible emulsion is coarse or smooth oil-in-water emulsion; and further wherein said viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

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<sup>2</sup> (Final Office Action (“Final”), mailed May 30, 2007)

<sup>3</sup> (Amended Appeal Brief (“Br.”), filed Dec. 3, 2007, 3.)

14. A method for making an edible emulsion comprising insoluble fibers comprising the steps:

a) mixing, in no particular order,

less than about 85.0% by weight oil,

water,

insoluble fiber, wherein the insoluble fibers are citrus or non-citrus;

thickener and

about 0.5 to about 12.0 % by weight emulsifier comprising a viscosity building emulsifier that at 2.0% by weight is partially or completely not soluble in acidified deionized water having a pH of  $\leq 5.5$  or a viscosity-building emulsifier that is at least about 50.0% by weight protein, or both, to make a coarse emulsion; and

b) recovering the coarse emulsion

wherein the coarse emulsion may optionally be homogenized in a homogenizer to produce a smooth emulsion; and further wherein viscosity building emulsifier makes up about 0.1 to about 4.0 percent by weight of the edible emulsion, with the proviso that when chemical emulsifier is used, less chemical emulsifier is used than viscosity-building emulsifier.

The Examiner maintains<sup>4</sup>, and Appellants request review of (App. Br. 5), the sole ground of rejection: claims 1, 3, 4, 8-17, 19-23 and 25 under 35 U.S.C. § 103 as unpatentable over Ambjerg-Pedersen<sup>5</sup> (hereafter

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<sup>4</sup> (Examiner's Answer ("Ans."), mailed Jan. 14, 2008, as corrected in Paper Nos. 20080204 and 20090513.)

<sup>5</sup> (EP 0 757 895 A2, pub. Feb. 12, 1997.)

“Hercules”) in view of Fischer<sup>6</sup> as further evidenced by Lowe<sup>7</sup> and Schwartzberg<sup>8</sup>.

We have considered the separate arguments advanced by Appellants in support of patentability as to each of the independent product claims 1 and 17, dependent product claims 22-23, independent method claim 14, and dependent method claim 15. However, we are not persuaded of error in the Examiner’s obviousness determination. Rather, we find the Examiner’s factual findings and reasoning, as expressed by the Examiner in the Final (pp. 2-3) and the Answer (pp. 2-8), support the Examiner’s obviousness determination. We adopt these findings and reasons as our own in sustaining the rejection of claims 1, 3, 4, 8-17, 19-23 and 25. For the sake of completeness, we add the following comments directed to arguments which Appellants continue to advance in the Reply Brief<sup>9</sup>.

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<sup>6</sup> (Jürgen Fischer, *Improved Fruit Fibres for Modern Food Processing*, in *Food Ingredients and Analysis International* 29-31 (May-June, 2001)).

<sup>7</sup> (Belle Lowe, *Experimental Cookery From the Chemical and Physical Standpoint* 271 (John Wiley & Sons, 2d Ed. 1937)).

<sup>8</sup> (*Physical Chemistry of Foods* 264-265 (Henry G. Schwartzberg & Richard W. Hartel, eds. 1992).)

<sup>9</sup> (“Rep. Br.”), filed Mar. 12, 2008.

Appellants argue there is no motivation to include Fischer's Herbacel AQ in Hercules' composition (App. Br. 12-13; Rep. Br. 4-5.) This argument is not persuasive because Appellants have not explained, with any degree of specificity, why the Examiner's findings with respect to the prior art and proposed reasons for using Fischer's Herbacel in Hercules's composition (*see e.g.* Ans. 5-6 (motivation is enhancement of nutritional quality and viscosity)) are erroneous or lack evidentiary support. (App. Br. 12-13; Rep. Br. 4-5.)

Appellants assert that Hercules teaches away from the use of proteins as viscosity building emulsifiers and from the use of a high pressure/high shear homogenizer. (App. Br. 13-15; Rep. Br. 5-7.) These arguments are not persuasive because they are directed to features which are not required by the claims (*see* ¶ (c) of claims 1 and 17, ¶ (a) of claim 14 (a specific protein is neither recited, nor required) and ¶ (c) of claim 14 (optional homogenizing step)) and fail to identify error in the factual findings relied upon by the Examiner for a disclosure of a viscosity-building emulsifier as claimed (*see* Ans. 7).

Finally, Appellants continue to rely on a single example in the Specification as evidence of unexpected results. (App. Br. 16; Rep. Br. 7.) This example does not provide persuasive evidence of non-obviousness as it is not commensurate in scope with the claims.

In view of the foregoing, we affirm the Examiner's decision to reject claims 1, 3, 4, 8-17, 19-23, and 25.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1).

Appeal 2009-011383  
Application 10/693,475

AFFIRMED

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